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ADJUDICATING COMPLIANCE IN THE WTO: A REVIEW OF DSU ARTICLE 21.5

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ABSTRACT

This article provides an analytical overview of one of the most important provisions in the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes. That is Article 21.5 which provides for a review of whether governmental measures taken to comply do in fact achieve compliance with WTO rules. Part I discusses the purposes that Article 21.5 serves and how they relate to the larger objectives of dispute settlement. Part II presents a table summarizing the Article 21.5 caselaw through February 2002, and then draws a few conclusions from that practice as to how well Article 21.5 is working. Part III discusses some procedural issues that have arisen in the new case law. Among the questions examined are which governments have standing to invoke Article 21.5 and what limits exist on raising new claims. The article concludes that Article 21.5 compliance panels and the Appellate Body are developing an innovative body of law that will serve a growing role in the cooperative management of the multilateral trading system.

INTRODUCTION

Whenever a World Trade Organization (WTO) panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, the Dispute Settlement Understanding (DSU) provides that the panel or Appellate Body shall recommend that the Member concerned bring the measure into conformity with that agreement.[1] Thereafter, the DSU provides a mechanism through which to determine objectively whether the Member concerned has achieved conformity. Article 21.5 of the DSU states:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. . . .[2]

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[1] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 19.1.

[2] DSU Article 21.5. The DSU's term 'panel' is employed here to describe the initial Article 6 panel in contrast to the follow-up Article 21.5 compliance panel.

This compliance review function did not exist before the establishment of the WTO. It was absent from the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), and from the International Trade Organization Charter. While the Contracting Parties to the GATT formally introduced the idea of post-panel surveillance in 1979, that mechanism did not provide for an independent review.[3] It is true that pursuant to GATT Article XXIII, panels occasionally reviewed the existence or consistency of measures taken to comply with previous recommendations and rulings, but such panels were not regularly established and did not operate under any special rules.[4]

Although Article 21.5 is the linchpin of compliance management in the WTO, this law and practice has received little attention in WTO commentary.[5] The purpose of this article is to review some key aspects of that law and practice. As of February 2002, there have been 11 panel reports pursuant to Article 21.5. The article proceeds in three parts followed by a conclusion. Part I will discuss the context and basic principles of Article 21.5. Part II summarizes the Article 21.5 case law so far and suggests that this process is working well. Part III addresses some doctrinal and procedural questions. Note that in discussing the case law of Article 21.5, we are *not* examining the substantive jurisprudence related to the myriad WTO obligations. Many important interpretations have emerged in Article 21.5 proceedings, yet that jurisprudence belongs to the law of the particular covered agreement.

I. THE CONTEXT AND BASIC PRINCIPLES OF ARTICLE 21.5

When placed in context with the other provisions in Article 21 and with the other articles of the DSU, Article 21.5 reflects three basic principles for the Dispute Settlement Body's (DSB) surveillance of implementation. It should: (A) promote 'prompt compliance' with the recommendations and rulings of

[3] See Understanding on Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979 (BISD 26S/210), para. 22 ('The Contracting Parties shall keep under surveillance any matter on which they have made recommendations or given rulings. If the Contracting Parties' recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may ask the Contracting Parties to make suitable efforts with a view to finding an appropriate solution.').

[4] See, e.g., Panel Report on Follow-up on the Panel Report on 'European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins', BISD 39S/91 (not adopted); see also Panel Report on Uruguayan Recourse to Article XXIII, adopted 3 March 1965, BISD 13S/35, 45. In one dispute, the complaining party was not a party to the original dispute but argued that the defendant 'failed to bring into conformity' a measure which an earlier panel had previously found to be inconsistent with the GATT. The complaining party requested an 'expedited proceeding' to address these measures before addressing other measures in dispute. See Panel Report on Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, adopted 18 February 1992, BISD 39S/27, paras 3.1–3.4.

[5] Until recently, the WTO website did not separately profile the Article 21.5 reports. The remodeled website will make it easier for practitioners and scholars to undertake studies of the new jurisprudence under DSU Article 21.3 (reasonable period of time), Article 21.5, and Article 22.6 (amount of retaliation) decisions.

the DSB; (B) be based on an 'objective assessment' of any measures taken to comply; and (C) further the 'security and predictability' of the multilateral trading system.

A. Prompt Compliance

An Article 21.5 proceeding differs from an original WTO dispute settlement proceeding in two fundamental procedural respects. First, while the original panel has a notional six-month period to issue its final report, an Article 21.5 compliance panel has only 90 days.[6] Secondly, while a defendant in an original WTO proceeding is normally entitled, under Article 21.3, to a 'reasonable period of time' to implement the recommendations and rulings of the DSB, no such 'grace period' seems to be available in Article 21.5 proceedings.[7] As a result, in an Article 21.5 proceeding, a complainant can request authorization to suspend concessions immediately after the DSB adopts an adverse Article 21.5 report.[8]

These two fundamental differences reflect Article 21's purpose of securing 'prompt compliance with recommendations or rulings of the DSB'.[9] In particular, Article 21 prevents defending parties from dragging their feet indefinitely and with impunity.[10] Without this Article, a defendant could replace measures that have been ruled a WTO violation with new measures that are

[6] Compare DSU Article 12.8 to Article 21.5. Note, however, that no Article 21.5 panel since *EC – Bananas* (Ecuador) and *EC – Bananas* (EC) has circulated its report within 90 days of the date the DSB referred the matter to it. The longest it has taken the panel to circulate its report has been approximately eight months which elapsed in *United States – FSC* and *Mexico – HFCS*. Nevertheless, the Article 21.5 reports are generally circulated on an expedited basis, compared to original panel reports.

[7] Article 21.5 states that disagreements shall be decided through recourse to 'these' dispute settlement procedures. So far, the case law has not clarified exactly which DSU procedures are relevant. For example, in *Mexico – HFCS (21.5)*, the Appellate Body reserved judgment on whether a requirement for prior consultation exists in Article 21.5. WTO Appellate Body Report, Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States *('Mexico – HFCS (21.5)')*, WT/DS132/AB/RW, adopted 21 November 2001, para 65. To our knowledge, no government has yet contended that the allowance of a reasonable period of time under Article 21.3 applies to Article 21.5 proceedings. There would be a colorable argument for that however.

[8] In fact, the original complainant is not required to initiate an Article 21.5 proceeding or to wait for a conclusion of an Article 21.5 proceeding before requesting authorization to suspend concessions. This procedural disjunction is known as the DSU Article 21/Article 22 sequencing problem, and is discussed briefly herein.

[9] DSU Article 21.1. In a similar vein, several Article 21.5 panels have noted that Article 21.5 serves to secure the 'prompt settlement' of disputes in accordance with DSU Article 3.3. See, e.g., WTO Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador (*EC – Bananas (21.5) (Ecuador)*), WT/DS27/RW/ECU, adopted 6 May 1999, para 6.9.

[10] While the expedited nature of Article 21.5 proceedings is designed to secure prompt compliance, it should be noted that the defendant government could abuse Article 21.5 in order to postpone compliance. Even a feeble attempt at implementation will lead to a compliance panel and appeal, and these proceedings will consume many months.

also a violation. If the complainant were required to initiate a new dispute for WTO-illegal replacement measures, the delinquent government might be able to evade full implementation. By eliminating the possibility of a continuous loop of evasion, the expedited nature of Article 21.5 proceedings was designed to increase the likelihood of full compliance.

Article 21.5 can also enhance the likelihood of prompt compliance by adding another step in the process, in which the offending government can reconsider its WTO violation. Building on Robert E. Hudec's insight that the process of threatening trade retaliation may influence political decision-making in the target country,[11] we see the Article 21.5 review as helping to convince government and private actors in the defendant country that better efforts at compliance will be needed. The benefits of Article 21.5 to the complaining country were demonstrated in *Brazil – Aircraft*, where Canada chose not to use the DSB-authorized retaliation, and instead sought a *second* Article 21.5 panel to evaluate new measures taken by Brazil.[12] Canada apparently concluded that a second Article 21.5 panel would promote prompt compliance more readily than the act of retaliation itself.

B. Objective Assessment in DSB Surveillance

Article 21 of the DSU provides for, and is titled, 'Surveillance of Implementation of Recommendations and Rulings'. Article 21.5 should be read in conjunction with Article 21.6, which states:

> The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. . . .

This surveillance function would be difficult to fulfill in the absence of independent verification of implementation. With Article 21.5, self-serving assertions of compliance or non-compliance are not the last word. A compliance panel, like other panels established by the DSB, is required to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the

[11] Robert E. Hudec, 'Broadening the Scope of Remedies in WTO Dispute Settlement', in Friedl Weiss: *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (London: Cameron May 2000), 369, 388 (and fn 34).

[12] WTO Panel Report, Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU (*Brazil – Aircraft (2nd) (21.5)*), WT/DS46/RW/2, adopted 23 August 2001. We use 2nd rather than II to signify the second in a series of Article 21.5 panels. The designation of II, III in captioning WTO cases has been used to denote a series of original panels (e.g., *Bananas*).

relevant covered agreements'.[13] Article 21.5 assigns the panel three objective tasks. The panel must determine whether there is a 'disagreement' between the parties, whether measures taken to comply have 'existence', and whether such measures manifest 'consistency' with the rules in WTO agreements. The objective findings of the Article 21.5 panel enable the DSB to carry out surveillance under Article 21.6 and to decide whether the conditions laid out in Article 22.2 apply – namely, that a Member has failed to bring its measure into compliance. Such a failure will permit the complainant to seek authorization for retaliation (i.e., a suspension of concessions or other obligations).[14]

The importance of securing an objective assessment in Article 21.5 decisions was underlined recently in the *Canada – Milk (21.5)* case, where the Appellate Body reversed the panel's 'error in law' and found that it could not determine, based on the existing factual record, whether an implementing measure was consistent with the implicated WTO agreements.[15] In some Appellate Body decisions in original proceedings, a finding of an inadequate factual record has frustrated the complainant and led to a procedural dead end because the DSU lacks a formal remand. Yet in the *Canada – Milk (21.5)* case, the plaintiff was able to secure another Article 21.5 review to adjudicate the continuing 'disagreement'.[16] This is in effect a functional remand and is an example of the innovative ways in which Article 21.5 is being carried out.

By enhancing the objectivity of the compliance review process, Article 21 incorporates the best elements of bilateral dispute settlement into a multilateral compliance management system.[17] Any WTO Member is entitled to raise at the DSB its concerns about whether a defendant government has complied.[18] The use of noncompliance procedures, rather than dispute settlement, is the norm in multilateral environmental agreements.[19] In contrast to

[13] DSU Article 11.

[14] William J. Davey, 'The WTO Dispute Settlement System', 3(1) JIEL 15 (2000), at 17 (noting that logically a decision on consistency must be made before a suspension of concessions is authorized).

[15] Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States (*Canada – Milk (21.5)*), WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, paras 102–04, 127.

[16] Daniel Pruzin, 'US, Canada, New Zealand Agree on Procedures for Continuing Dairy Panel', BNA Daily Report for Executives, 19 December 2001, at A-5. Canada went along but complained that the new proceeding entailed 'double jeopardy'.

[17] For discussion of the managerial model of compliance in international regimes, see Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press 1998).

[18] DSB Article 21.6 (stating that the issue of implementation may be raised by any Member).

[19] Robin R. Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', 94 AJIL 623 (2000), at 644; Volker Röben, 'Institutional Developments under Modern International Environmental Agreements', 4 Max Planck Yearbook of United Nations Law 363 (2000), at 409, 409–19. An exception exists in the Convention on the Protection of the Marine Environment of the Northeast Atlantic (OSPAR) of 1992 which provides for an arbitral panel to examine compliance. Id. at 435–36.

the WTO, however, most environmental agreements do not provide for a referral to an independent, objective panel (although the Secretariats sometimes have a fact-finding and assessment role).

C. Security and Predictability

Article 21.5 contributes to achieving 'security and predictability' in the multilateral trading system, a goal recognized in Article 3.2 of the DSU.[20] Before the establishment of the WTO, a GATT Contracting Party could try to 'self-certify' that it had taken measures to comply with a panel ruling, and often the complainant disagreed. This dispute became difficult to resolve. The complainant was reluctant to initiate an entirely new panel proceeding, recognizing that such effort would be time-consuming, and might not advance the parties any further than they were before. As Hudec explained:

> The vice of the GATT's follow-up procedure was that enforcement was left to the persistence of the complainant. To bring pressure to bear on the defendant, the complainant had to place the issue on the agenda of the GATT Council, make demands for compliance, urge other governments to support the demand, and eventually threaten retaliation. . . . Each initiative by the complainant could be regarded as an unfriendly act.[21]

As a result, the GATT follow-up procedure allowed for considerable insecurity and unpredictability, and the DSU was written to ameliorate those conditions.

The possibility of going back to court (so to speak) through Article 21.5 enhances security and predictability because it reaffirms the rule of law. The same point can be seen again by reflecting on how effortlessly the DSU process has reified a right to appeal an Article 21.5 panel decision. Such appealability was not at all clear until the first appeal in May 2000.[22] In the first four Article 21.5 decisions, no appeals ensued. Once the possibility of appeal

[20] DSU Article 3.2 ('The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.'). For a general discussion of the objectives of security and predictability, see Edwini Kessie, 'Enhancing Security and Predictability for Private Business Operators under the Dispute Settlement System of the WTO', 34(6) Journal of World Trade 1 (2000).

[21] Above n 11, at 393–94. Hudec has noted that, in Part IV of the GATT, dealing with trade and development, the Contracting Parties attempted to create a community enforcement system that would take some of the responsibility (and onus) off the shoulders of the victim party. See Article XXXVII:2 of the GATT. Nevertheless, in practice, the Contracting Parties did not achieve this objective.

[22] For example, see Hudec, ibid, at 398 (suggesting the possibility of adding an appeal from the decision of the Article 21.5 panel). Recently, the European Communities suggested that anticipated DSU revisions should include a systematic right of appeal against rulings of compliance panels. Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding, Communication from the European Communities, TN/DS/W/1 (13 March 2002), at 4. See also Willaim J. Davey, 'The WTO Dispute Settlement System', in Gary P. Sampson and W. Bradnee Chambers (eds), *'Trade, Environment, and the Millennium'* (2nd edn, Tokyo: United Nations University Press 2002) 145, 157 (noting that Article 21.5 is not clear whether there is a right to appeal).

was shown in *Brazil – Aircraft (21.5)*, when the Appellate Body agreed to hear the case following the concurrence of the parties, appeals occurred in five of the next six cases where a panel judgment was issued. It is interesting to note that India appears to have been the first government to underline the importance of appealability of Article 21.5 panels.[23]

The Article 21.5 mechanism also enhances security and predictability by potentially closing out a dispute. When an Article 21.5 panel concludes that a member *has* taken compliance measures and that these measures are fully consistent with the covered agreements, then legal peace can be re-established. Private economic actors will no longer have to worry about the dispute and possible retaliation, and the complainant and the defendant governments can put the WTO litigation behind them.

But consider this most recent development: In its Article 21.5 decision in *US – Shrimp*, the panel reached a surprising conclusion that the new US measure constituted compliance only 'as long as the conditions in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied'.[24] The panel went on to declare that should those conditions 'cease to be met in the future', then 'any complaining party in the original case may be entitled to have further recourse to Article 21.5 of the DSU'.[25] This conclusion was affirmed by the Appellate Body and shows that even a *success* in compliance may lead to a follow-up review proceeding.[26] Such continuing jurisdiction can occur when the substantive WTO legal obligation at issue is a dynamic one, such as an obligation to negotiate multilateral agreements in good faith. Under this *US – Shrimp* ruling, Malaysia's ability to demand another Article 21.5 panel is open-ended, and WTO-conformity by the United States 'may be reassessed at any time'.[27] This result is in tension with the goal of security and predictability.

[23] WTO Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by the European Communities (*EC – Bananas (21.5) (EC)*), WT/DS27/RW/EEC (this report was never put on the DSB agenda for adoption), para 3.6 (Statement of India) ('It was true that Article 21.5 was silent on whether there was a possibility of appeal against the panel verdict. It was India's view that there must be a possibility of appeal as well. . . . If the right to suspend concessions was granted without due process, it would spell the end of the security and predictability of the dispute settlement mechanism and indeed of the multilateral trading system as a whole.').

[24] WTO Panel Report, United States – Import Prohibitions of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia (*US – Shrimp (21.5)*, WT/DS58/RW, adopted as modified by the Appellate Body 21 November 2001, para 6.1(a). In the *Brazil – Aircraft (2nd) (21.5)* decision, the panel had noted that Canada would be free to challenge future application of Brazil's new subsidy program. The panel did not clearly say that this could be done in Article 21.5, however. *Brazil – Aircraft (2nd) (21.5)*), above n 12, para 6.3.

[25] *US – Shrimp (21.5)* above n 24, para 6.2. The panel did not explain why recourse to Article 21 might be limited to complainants in the original case.

[26] Ibid, paras 152, 153(b).

[27] Ibid , para 5.88.

II. ARTICLE 21.5 IN PRACTICE: IS IT WORKING?

WTO Members have sought recourse to Article 21.5 in 13 cases as of the end of February 2002. While a description of each dispute is beyond the scope of this article, Table 1 identifies these disputes in chronological order and summarizes the results of Article 21.5 scrutiny.

Three years and 12 cases provide enough practice to begin an appraisal of Article 21.5. The bottom line is whether Article 21.5 promotes compliance and amicable resolution of disputes. While we believe that it does, that conclusion is difficult to demonstrate. We cannot know the answer to the counter-factual of how the WTO would have operated if Article 21.5 did not exist. It is true that several of the listed disputes remain unsettled, but that does not show a dysfunction since the WTO disputes going to Article 21.5 are probably more intractable than the remaining disputes. A failure of the defendant government to comply is hardly a singular failure of Article 21.5.

Based on the experience so far, we conclude that Article 21.5 is working as governments intended, or even better than intended. The new procedure is being used. It operates in an expedited fashion at the panel level and it is detecting non-compliance. We discuss these points below.

A. Complaining Parties Are Using Article 21.5

Since the December 1998 request by the European Communities to convene the first Article 21.5 panel, the DSB has convened 12 more panels. The fact that complaining parties continue to exercise recourse to Article 21.5 suggests that the process is viewed as worthwhile by governments.[28] In many of those cases in which Article 21.5 was not invoked, either the complainant appeared satisfied with the defendant's implementation, or no implementation occurred and the complainant requested authorization to suspend concessions without first seeking recourse to Article 21.5.[29] Thus, when Article 21.5 is needed, the experience suggests that governments will use it.

One noteworthy point about the regular use of Article 21.5 is that complainants are *voluntarily* resorting to this mechanism before seeking to suspend concessions under Article 22. The proper 'sequencing' of Article 21.5 review and the authorization of retaliation under Article 22 is not clear from

[28] In the 44 episodes in which an Article 21.5 action could have been invoked, it was invoked in 12 (with *Canada – Milk* counting as one). Our standard for 'could have been invoked' is a final judgment in favor of the complainant followed by the expiration of the reasonable period of time for implementation. Data based on tabulations by the authors.

[29] Article 21.5 only authorizes a panel to determine the 'existence' of measures taken to comply where there is a 'disagreement' as to whether such measures exist. Where the defendant does not contend that it has taken measures to comply, complaining parties have, on occasion, requested authorization to suspend concessions without first initiating an Article 21.5 proceeding. See, e.g., *EC – Measures Concerning Meat and Meat Products (Hormones)*.

the text of the DSU.[30] In practice, however, when compliance is contested, the parties often negotiate a procedural agreement to delay any request for an Article 22 suspension until after the circulation or adoption of the Article 21.5 panel report.[31] That complainants elect to postpone a request for the suspension of concessions suggests they have confidence in the value of an 'objective assessment' through Article 21.5. The expedited process of Article 21.5 makes the duration of the wait tolerable. In other words, WTO Members appear to believe that Article 21.5 properly balances due process concerns with the need for prompt compliance.

B. Complaining Parties Are Not Abusing Article 21.5

Article 21.5 panels and the Appellate Body have regularly found that the measures taken to comply are inconsistent with a WTO agreement. Examining the experience to date, Table 1 shows that in 12 decisions, non-compliance was found in seven of them. These frequent findings of inconsistency suggest, somewhat paradoxically, that the Article 21.5 mechanism is working as planned. When a complainant seeks the establishment of an Article 21.5 panel, it is usually for good reason. Complainants are not subjecting defendants to unwarranted legal challenge.

III. EMERGING PROCEDURAL ISSUES IN COMPLIANCE REVIEW

The newness of Article 21.5 has led to several interpretative uncertainties, and other issues may loom in future cases. In Part III, we discuss several points that merit more attention within the WTO system. They are: standing, scope of review, laches, and collateral estoppel.

[30] For a discussion of the conflict between DSU Articles 21.5 and 22, and the resolution of it through procedural agreements, see Sylvia A. Rhodes, 'The Article 21.5/22 Problem: Clarification through Bilateral Agreements?', 3 JIEL 553, 556 (2000); Cherise M. Valles and Brendan McGivern, 'The Right to Retaliate under the WTO Agreement: The ''Sequencing Problem'' ', 34(2) Journal of World Trade (2000), at 63–84; Carolyn B. Gleason and Pamela D. Walther, 'The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform', 31 Law & Pol'y Int'l Bus 709 (2000), at 721-28; Allan Rosas, 'Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective', 4(1) JIEL 131 (2001), at 141–42. The conflict between the two DSU Articles arises from the seeming 30-day time limit in Article 22.6 for authorizing retaliation.

[31] This use of procedural agreements confirms Robert Ellickson's hypothesis that 'members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another'. Robert C. Ellickson, *Order Without Law* (Cambridge: Harvard University Press 1991) 167. In other words, even though WTO Members have not rewritten DSU law to correct the sequencing problem, the Members (who are repeat players in a small community) are applying new procedural norms through bargaining. The norm that adjudication of compliance must precede retaliation against non-compliance maximizes the aggregate welfare of the WTO Members.

Table 1. Article 21.5 Disputes: The WTO Experience through February 2002

Complaint	Complainant in Article 21.5 proceeding	Panel finding on measures taken	Appellate Body finding	Result
EC – Bananas (Recourse by European Communities)	European Communities (EC) – seeking presumption that the measures it took are consistent	No finding of presumption of consistency	No appeal	Not adopted The United States (US) did not participate in Article 21.5 proceedings The US retaliated with authorization (see below)
EC – Bananas (Recourse by Ecuador)	Ecuador	Inconsistent	No appeal	Adopted DSB authorizes retaliation after arbitral finding of WTO-inconsistency; Ecuador does not retaliate Settlement
Australia – Leather	US	Inconsistent	No appeal	Adopted Settlement
Australia – Salmon	Canada	Inconsistent	No appeal	Adopted Settlement
Brazil – Aircraft	Canada	Inconsistent	Upholds panel finding	Adopted DSB authorizes retaliation, but Canada does not use Canada agrees to 2nd panel
Canada – Aircraft	Brazil	Consistent (Technology Partnerships) Inconsistent (Canada Account)	Upholds panel	Adopted Brazil files new complaint
US – DRAMS	Korea	No legal finding		Panel suspended and case settled
US – FSC	EC	Inconsistent	Upholds panel finding	Adopted Negotiations ongoing
Brazil – Aircraft (2nd)	Canada	Not inconsistent	No appeal	Adopted Negotiations ongoing
Mexico – HFCS	United States	Inconsistent	Upholds panel findings	Adopted Negotiations ongoing
US – Shrimp	Malaysia	Not inconsistent	Upholds panel finding	Adopted Dispute appears resolved, so long as US negotiates in good faith
Canada – Milk	New Zealand, US	Inconsistent	Reverses panel finding	Adopted New Article 21.5 panel requested (functional remand)
Canada – Milk (2nd)	New Zealand, US	Review pending		

A. Who Can Seek Recourse to Article 21.5: The Question of Standing

Article 21.5 does not clearly specify which Members can question the WTO-consistency of implementation. Article 21.5 only requires that there be a 'disagreement' as to the existence or consistency of measures taken to comply. While the original complainant obviously may invoke Article 21.5 review, may the original defendant? And may a Member that was not involved in the original dispute become a complainant in an Article 21.5 review? These questions are addressed below.

1. May the Original Defendant Initiate an Article 21.5 Proceeding?

The DSU leaves open the question of whether an original defendant may initiate an Article 21.5 proceeding. The one panel that was faced with this question, *EC Bananas – (21.5) (EC)*, did not reach a decision because it held that even if the European Communities (the original defendant) could initiate an Article 21.5 proceeding, no finding of WTO consistency could be made based on the European Communities' submission.[32] Nevertheless, the Article 21.5 panel 'would not rule out the possibility of using Article 21.5 in such a manner, particularly when the purpose of such initiation was clearly the examination of the WTO-consistency of implementing measures'.[33]

Is this still a live issue? The procedural irregularity that led to the European Communities' request in *Bananas*[34] is unlikely to occur again, now that the sequencing problem is being dealt with bilaterally and will eventually be fixed in the DSU. In the absence of a retaliatory threat, defending governments will be happy not to have Article 21.5 panels if complaining governments do not ask for them. Yet it is because Article 21 of the DSU interlaces with Article 22 that a defending government could find it useful to call for an Article 21 panel when the complaining government does not. This procedural posture could occur whenever the complaining government denies that there have been any steps taken toward compliance and goes ahead to invoke Article 22.

The most compelling need for a defending government to be able to initiate an Article 21.5 review could eventuate *after* Article 22 retaliation. Suppose that complaining Country C is authorized by the DSB to retaliate against Country D, and C does so, and then thereafter, D takes measures that it argues constitute compliance, but C denies that the measures do so. Under current DSU rules, there is no clear way to adjudicate such a dispute and, if justified, to have the DSB direct Country C to cease its retaliation. This hypothetical situation is not farfetched; it is easily imaginable in the *Hormones*

[32] See *EC – Bananas (21.5) (EC)*, above n 23, para 4.14.

[33] Ibid, para 4.18.

[34] See Mauricio Salas and John H. Jackson, 'Procedural Overview of the WTO EC – Banana Dispute', 3(1) JIEL 145 (2000), at 156.

dispute if the European Commission were to conduct a new risk assessment that it argues provide enough scientific data to justify an import ban, but the US government disagrees.[35] Although Article 21.5 does not specifically state that it applies to post-retaliation situations, its broad language would seem to encompass any 'disagreement as to the existence or consistency . . . of measures taken to comply . . .'.[36] Furthermore, Article 22.8 of the DSU states that a suspension of concessions or other obligations 'shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed . . .'.[37]

If the DSB has already authorized and the original complainant has already implemented the suspension of concessions, then an initiation of an Article 21.5 proceeding by the original defendant may be the best way to turn off retaliation when the original complainant unilaterally determines that the measures taken to comply are insufficient and also refuses to initiate an Article 21.5 proceeding on its own (satisfied with the *status quo* of retaliation). Without recourse to the expedited Article 21.5 proceeding, the original defendant would have to initiate a new proceeding against the *retaliation*. That would be a lengthy and uncertain endeavor.[38] Since the substance of the dispute is compliance in the original proceeding, the Article 21.5 panelists would be better prepared to adjudicate the case quickly than would a new panel constituted under Article 6 of the DSU.[39]

One procedural concern relating to this issue deserves attention. In the *EC – Bananas (21.5) (EC)* dispute, Japan, a third party, noted that the procedural posture of the dispute created an 'anomaly' in that the European Communities was the sole party to the proceeding. Japan questioned whether the panel could fulfill its responsibility of objectively assessing the matter before it under these circumstances.[40] In this same vein, the Article 21.5 panel found that there was nothing in the DSU that would authorize a panel to compel a Member to participate as a party in a panel proceeding.[41] In our view, this 'anomaly' does not suggest that an original defendant should not be allowed to initiate an Article 21.5 proceeding. After all, a Member is never

[35] See WTO Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones),WT/DS26/AB/R, adopted 13 February 1998. 'EC Says New Studies Show Hormone Beef Poses Health Risks, Will Keep Ban on US', BNA Daily Report for Executives, 24 April 2002, at A-10.

[36] DSU Article 21.5. The continuing jurisdiction of the DSB (see DSU Article 21.6) could imply that a subsidiary body like the Article 21.5 panel also has continuing jurisdiction.

[37] DSU Article 22.8. The following sentence in that Article references DSU Article 21.6.

[38] In such a new proceeding, the original complainant would probably raise an affirmative defense that its retaliation had been authorized by the DSB, and that concerns about it should be raised in the DSB and not to a new panel.

[39] DSU, Article 6 (Establishment of Panels). Of course, it would be possible to appoint the same individuals who served on the original case to a new original panel.

[40] *EC – Bananas (21.5) (EC)*, above n 23, at para 3.12.

[41] Ibid, para 4.12.

compelled to participate in any WTO panel proceeding. If a defendant government decides not to participate, the panel would have to act without it.[42] So the same principle should apply reciprocally. If an original complainant decides not to participate, the panel should go forward and decide the case on the basis of the evidence presented.

In summary, a recourse through the DSB to Article 21.5 should be available to the defending Member because that practice is consistent with the purposes of Article 21, including the security and predictability of the trading system. The language in DSU Article 21.5 refers broadly to 'a disagreement', and so may already permit such a defensive claim. This ambiguity could be clarified in the anticipated DSU revisions.

2. May Non-Parties in the Original Proceeding Initiate Article 21.5 Proceedings?
No WTO panel has addressed whether a WTO Member not involved in the original proceeding may use a compliance panel to challenge measures putatively taken to comply.[43] Such a claim would assert that the resolution of the matter between the original parties interferes with that Member's rights. Suppose, for example, that Country D takes steps to comply that satisfy complainant Country C, but violate WTO rules in a way so as to adversely affect Country E, a non-party to the original case. This scenario is easily imaginable in disputes regarding the allocation of quotas. While a Member in this predicament would clearly be entitled to request the establishment of an entirely new panel, the Member might generally prefer to initiate an expedited Article 21.5 proceeding with a panel that is already familiar with the substance of the dispute.

The DSU appears to contemplate the initiation of an Article 21.5 proceeding by a Member not party to the original proceeding. Article 21.5 governs a 'disagreement' relating to measures taken to comply, without providing any explicit limitation on the Members that can be a party to that disagreement. And Article 21 generally recognizes that 'all Members' have an interest in implementation. For example, Article 21.1 recognizes that all Members bene-

[42] The International Court of Justice recognizes this general principle. *See Statute of the International Court of Justice*, Article 53:

> 1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction . . . but also that the claim is well founded in fact and law.

See also Shabtai Rosenne, *The Law and Practice of the International Court*, 1920–1996, Vol. III, (1401–14) (3d edn, Martinus Nijhoff Publishers 1997).

[43] One GATT case may be instructive. In the Panel Report on Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, above n 4, the United States, a non-party to the original dispute, claimed that Canada failed to bring into conformity measures that a previous panel had found to be inconsistent with GATT rules.

fit from prompt compliance, while Article 21.6 provides that 'any Member' may raise the issue of implementation at the DSB.

The argument against giving standing to former non-parties is that the Article 21.5 proceeding is an outgrowth of the original proceeding, and thus should be limited to the original participants. Yet that principle is not followed when it comes to third parties. Article 21.5 panels have regularly granted third-party status (upon request) to Members who were not third parties in the original proceeding.[44]

Given that practice, we see no rationale for reading the DSU as being *more* restrictive for standing to be a new first-party complainant. Thus, the DSU may permit a non-party in the original case to invoke Article 21.5 with respect to a violation of its own rights when that violation results from a measure taken to comply.

B. What Measures May Be Challenged and New Claims Raised: The Question of Scope

Neither a panel nor the Appellate Body has yet ruled that a dispute brought before an Article 21.5 panel was beyond the scope of Article 21.5. Yet future Article 21.5 panels will almost inevitably be confronted with measures or matters that are better addressed by a first instance Article 6 panel.[45] Two issues arise in relation to the scope of Article 21.5 review: (1) what measures constitute 'measures taken to comply' and (2) what new claims may be raised in an Article 21.5 dispute.

1. Meaning of 'Measures Taken to Comply'

Article 21.5 panels are confronted with a need to ascertain the 'measures taken to comply'. One issue is whether a complainant can challenge a measure

[44] The EC and Mexico became a new third party in *Australia – Leather (21.5)*. Australia became a new third party in *Brazil – Aircraft (21.5)*. Australia, India, and Jamaica became new third parties in *US – FSC (21.5)*. Korea became a new third party in *Brazil – Aircraft (2nd) (21.5)*. The EC became a new third party in *Mexico – HFCS (21.5)*. Canada became a new third party in *US – Shrimp (21.5)*. The EC and Mexico became new third parties in *Canada – Milk (21.5)*. The question of whether this practice was consistent with the DSU was apparently not raised in any of these cases.

[45] Section B focuses on whether a dispute brought before an Article 21.5 panel would be better addressed by a first instance Article 6 panel. The opposite, however, is also possible: a complaining party might choose to initiate a new proceeding when an Article 21.5 proceeding would be more appropriate. For example, although Article 21.5 provides that the original panel should hear the case, a complaining party, dissatisfied with the original panel's findings, may opt for an entirely new Article 6 panel, effectively engaging in 'forum shopping'. For a discussion of whether challenges to 'measures taken to comply' *must* be brought under the accelerated procedures of Article 21.5 (including a discussion of the 'forum shopping' issue), see WorldTradeLaw.net Dispute Settlement Commentary for Canada – Export Credits and Loan Guarantees for Regional Aircraft (available at http:/www.worldtradelaw.net/dsc/dscpage.htm). In that case, Canada argued that some of Brazil's claims related to implementation issues arising from the previous *Canada – Aircraft* dispute and that such implementation concerns must be addressed in an Article 21.5 proceeding. The panel found,

that the defendant has not identified as one of its measures taken to comply. This might occur if the defendant points to one measure as proof of compliance and asserts that another measure, the one challenged by the complainant, is unrelated to the defendant's efforts at implementation. For purposes of this discussion, we will refer to this measure, challenged by the complainant, as the 'aggravating measure'.[46]

Article 21.5 panels have utilized two approaches to deciding whether an aggravating measure can be considered a measure taken to comply and, as a result, can be reviewed on an expedited basis under Article 21.5. We call them *Deferential* and *Clearly Connected*, and discuss them below.

a. Deferential Approach

Under the Deferential approach, the Article 21.5 panel permits the complainant to delineate the scope of the Article 21.5 review. *Australia – Leather* exemplifies this approach. In the original proceeding, the panel found that certain payments under a grant contract by the Australian government to a leather company and its parent constituted an export subsidy prohibited by Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures ('SCM Agreement').[47] After the DSB adopted the panel's rulings, the defendant Australia asked the leather company to repay a portion of the grant. In parallel, however, Australia also made a new loan to the parent. In the Article 21.5 proceeding, the United States argued that this new loan was inconsistent with the recommendations and rulings of the DSB and with Article 3 of the SCM Agreement.[48] Australia responded that the new loan was not part of its implementation action, and so fell outside of the Article 21.5 panel's terms of reference.[49] Australia stated that it had not included the loan in its notification to the DSB regarding implementation.

The Article 21.5 panel rejected Australia's defense and found that the new loan was within its terms of reference.[50] The panel explained that in WTO panels, the complainant determines which measures are in dispute:

> In general, it is the complaining Member in WTO dispute settlement which establishes the scope of the measures before the panel. . . . For us to rule . . . that we are precluded from considering the [new] 1999 loan, would allow

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in essence, that Brazil's claims did not relate to implementation. As a result, the panel did not decide whether implementation issues must be addressed in a compliance panel.

[46] This reference is based on language in the WTO Panel Report, Australia – Measures Affecting Importation of Salmon – Recourse by Canada to DSU Article 21.5 (*Australia – Salmon (21.5)*), WT/DS/18/RW, adopted 20 March 2000, para 7.10, §23.

[47] WTO Panel Report, Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS126/R, adopted 16 June 1999, para 10.1(b).

[48] WTO Panel Report, Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States, WT/DS126/RW (*Australia – Leather (21.5)*), WT/DS126/RW, adopted 11 February 2000, para 1.4.

[49] Ibid, para 6.1.

[50] Ibid, para 6.7.

> Australia to establish the scope of our terms of reference by choosing what measure or measures it will notify, or not notify, to the DSB in connection with its implementation of the DSB's ruling.[51]

The panel then went on to state that 'In the absence of any compelling reason to do so, we decline to conclude that a measure specifically identified in the request for establishment is not within our terms of reference'.[52] Note that this statement is not categorical; the panel suggested the possibility that there might be compelling reasons to narrow a complainant's proposed terms of reference.

b. Clearly Connected Approach

Under the Clearly Connected approach, the Article 21.5 panel looks for a connection between the aggravating measure and the original violation. *Australia – Salmon* exemplifies this approach. In the original dispute, the Appellate Body found that Australia's import prohibition on fresh, chilled and frozen salmon violated various provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures.[53] After Australia asserted that it had complied, Canada obtained an Article 21.5 panel. Four months after the proceedings began, the Government of Tasmania (an Australian subfederal state) enacted its own ban on imports of certain salmon products (the 'Tasmanian Measure'). Canada requested the Article 21.5 panel to review the 'Tasmanian Measure', but Australia argued that it was a measure '*not* taken to comply' with the DSB's recommendations, and was thus unreviewable.[54] The Panel disagreed with Australia, and stated that:

> . . . an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one 'taken to comply'. If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be *clearly connected* to the panel and Appellate Body reports concerned, both in time and respect of the subject-matter . . . .[55]

The panel then held that any quarantine measure applied to salmon imports from Canada was a measure to comply.

The two Australia panels are closer than they might seem. While the *Australia – Leather* panel made its decision with deference to the complaining government, the panel also suggested an alternative analytical approach that could be used if an Article 21.5 panel did have authority to narrow a complaint. The panel noted that the new loan 'is inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of

[51] Ibid, para 6.4.

[52] Ibid, para 6.5.

[53] WTO Appellate Body Report, Australia – Measures Affecting Importation of Salmon, WT/DS/18/R, adopted 6 November 1998, para 279(d).

[54] *Australia – Salmon (21.5)*, above n 46, paras 4.27, 4.35.

[55] Ibid, para 7.10 §22.

both its timing and its nature'.[56] This reasoning is similar to the *Salmon* panel's test.

c. Discussion

In our view, an Article 21.5 panel should examine an aggravating measure when there is reason to believe that the measure is linked to the measure that the defendant claims is taken to comply with the DSB's recommendations and rulings. Defendant governments should not be allowed to escape oversight by revoking the original measure only to replace it with another measure that has the same effect. On the other hand, an Article 21.5 panel should not simply accept as within its scope any measure that the complainant places before it.

Evidence of a clear connection or inextricable link between the two measures could include the following: the aggravating and implementing measure (1) are linked in official government statements; (2) were enacted or adopted within a reasonably close period of time; (3) affect and specifically target the same product(s) or same producer(s); (4) were enacted or adopted by the same legislative or administrative body; and (5) are of the same general nature (e.g., both are sanitary measures). In many cases, for example, the aggravating measure will be part of the same legislation or regulation as the implementing measure (and, therefore, will be enacted or adopted by the same body). As a general matter, we would expect that an aggravating measure and an implementing measure that are part of the same legislation or regulation would be sufficiently connected to justify an Article 21.5 review of both measures.[57]

2. Scope for New Claims and Arguments

The question of whether new claims and arguments are admissible in Article 21.5 proceedings has come up in several cases. As noted above, no claims or arguments have been rejected on procedural grounds. Below we highlight two issues that we see in the jurisprudence.

a. New Claims and Arguments that Could Not Have Been Raised in the Original Dispute

Little doubt remains that an Article 21.5 panel has the authority to hear a

[56] *Australia – Leather (21.5)*, above n 48, para 6.5.

[57] Both the new loan in *Australia – Leather (21.5)* and the Tasmanian Measure in *Australia – Salmon (21.5)* would be subject to Article 21.5 review under our proposed standard. In *Australia – Leather (21.5)*, the new loan and the repayment of the subsidies were linked in an official press release; were provided within the same period of time; targeted the same producer(s); were (apparently) provided by the same government entity; and were of the same general nature (cash payments). Likewise, in *Australia – Salmon (21.5)*, the Tasmanian Measure would be subject to Article 21.5 review, although the link between the Tasmanian Measure and other measures Australia claimed it took to comply is less clear. First, the timing of the Tasmanian Measure suggests it was designed to offset the loss of the federal import ban. Secondly, the Tasmanian Measure targeted the exact same product (fresh, chilled and frozen salmon), and not, for example, some larger group of products that happened to include salmon. Finally, the Tasmanian Measure, like the measures purportedly taken to comply, were sanitary measures.

new claim or argument in the Article 21.5 proceeding if that claim or argument could not have been raised in the original dispute. This issue arose in *EC – Bananas (21.5) (Ecuador)*, where the panel accepted the allegedly new claims. The panel explained that 'There is no suggestion in the text of Article 21.5 that only certain issues of consistency of measures may be considered'.[58] The panel also emphasized that the goal of prompt settlement weighed against sidelining certain claims. In *Australia – Salmon (21.5)*, the panel held that

> Article 21.5 is not limited to consistency of certain measures *with the DSB recommendations and rulings* adopted as a result of the original dispute; nor to consistency with those covered agreements or specific provisions thereof that fell within the *mandate of the original panel* nor to consistency with specific WTO provisions *under which the original panel found violations*.[59]

In *Canada – Aircraft (21.5)*, the Appellate Body articulated the same principle:

> [U]nder Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments, and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel.[60]

The Appellate Body recognizes that new claims and arguments must be broadly permitted in Article 21.5 because the subject of these proceedings is the compliance measure. If a defendant government could replace a measure that is inconsistent with one provision of the WTO Agreements with a measure that is inconsistent with another WTO provision, then a government could drag its feet in implementation, as if Article 21.5 did not exist.

b. New Claims and Arguments that Could Have Been Raised in Original Dispute But Were Not

The statement by the Appellate Body in *Canada – Aircraft* quoted above is very broad, and may close the door to procedural objections on the admissibility of new claims. Nevertheless, we see one category of new claims that has more complexity than what was being contested in *Canada – Aircraft*. That is, may new claims or arguments that could have been raised in the original

[58] *EC – Bananas (21.5) (Ecuador)*, above n 9, para 6.8.

[59] *Australia – Salmon (21.5)*, above n 46, para 7.10 §9 (emphasis original).

[60] WTO Appellate Body Report, Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU (*Canada – Aircraft (21.5)*), WT/DS70/AB/RW, adopted 4 August 2000, para 41. The Appellate Body modified the first level Article 21.5 panel report on this point. Recently, the Appellate Body has repeated this holding. WTO Appellate Body Report, United States – Import Prohibitions of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia (*US – Shrimp (21.5)*), WT/DS58/RW, adopted 21 November 2001, paras 85–86, 90, 152.

dispute – and yet were not – be raised for the first time in an Article 21.5 proceeding? The question comes up because it may be unfair to allow the complaining government to trip up defending governments with claims that were omitted in the original proceeding, given the expedited nature of an Article 21.5 proceeding.

This situation will probably not happen often but did seem to occur in the recent case 'United States – Tax Treatment for Foreign Sales Corporations'. In the original proceeding, the plaintiff European Communities did not lodge a complaint about GATT Article III (national treatment). Then in the Article 21.5 proceeding, the European Communities raised that point with regard to a limitation on foreign content in the new US tax measure, which was a similar limitation to what existed in the original tax measure.[61] The panel found a violation with respect to GATT Article III and the Appellate Body affirmed.[62]

In circumstances like this, the defendant government could argue that because its compliance measure was designed to correct all of the WTO violations found in the original proceeding, it should not be held liable for not correcting a WTO violation that was *not* complained about earlier. In waiting until after the defendant government completes its compliance to introduce a new issue, the complainant government puts its adversary in an arguably unfair predicament of having no time to correct an unanticipated violation. In *US – FSC*, the Article 21.5 panel held that *none* of the previously-found WTO violations were corrected, so the addition of a new issue did not engender much unfairness. Yet one can imagine circumstances where the defendant does succeed in responding to all of the recommendations of the DSB only to get blindsided in the Article 21.5 proceeding with a new complaint about a WTO violation that may have been intentionally or unintentionally omitted from the original dispute. In such a circumstance, we wonder whether the Article 21.5 panel should invoke a doctrine of good faith and ask whether the complainant had an objectively reasonable or legitimate expectation that the WTO violation would be corrected when that matter was not raised in the original proceeding.[63]

[61] WTO Panel Report, United States – Tax Treatment for Foreign Sales Corporations – Recourse to Article 21.5 of the DSU by the European Communities (*US – FSC*), WT/DS108/RW, adopted as modified by the Appellate Body 14 January 2002, para 8.124. WTO Panel Report, United States – Tax Treatment for Foreign Sales Corporations, WT/DS108/R, adopted as modified by the Appellate Body 20 March 2000, para 7.107.

[62] WTO Appellate Body Report, Tax Treatment for Foreign Sales Corporations – Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/RW, adopted 14 January 2002, para 256(e).

[63] See Thomas Cottier and Krista N. Schefer, 'Good Faith and the Protection of Legitimate Expectations in the WTO', in Marco Bronckers and Reinhard Quick: *New Directions in International Economic Law. Essays in Honour of John H. Jackson* (The Hague: Kluwer Law International 2000), 47, 53, 56-57, 63-65. See also the discussion of 'abusive splitting' in WTO Panel Report, India – Measures Affecting the Automotive Sector, WT/DS146/R, WT/DS175/R, adopted 5 April 2002, paras 7.139, 7.140.

c. The 'Law of the Case': The Authoritativeness of the DSB's Original Rulings

While an Article 21.5 panel is generally not confined to examining the measures taken to comply from the perspective of the claims and factual circumstances surrounding the original proceedings, the Article 21.5 panel may be compelled to act in accordance with legal interpretations reached in the original proceedings. The Article 21.5 Panel in *United States – Shrimp* found that, 'in the absence of new claims, it is not required to go beyond reviewing the conformity of the implementing measure . . . with the findings of the Appellate Body' in the original dispute.[64] The Appellate Body supported this approach, noting that adopted panel and Appellate Body reports create 'legitimate expectations' among WTO Members.[65]

These holdings suggest that the Article 21.5 jurisprudence may be beginning to recognize a principle similar to the 'law of the case' doctrine in common law courts. The term 'law of the case' designates the principle that determinations of questions of law will generally be held to govern a case throughout all its subsequent stages where such determinations have already been made on a prior appeal to a court of last resort.[66] Thus, to the extent that a complainant is bringing the same legal claims and arguments as it brought in the original proceeding, an Article 21.5 panel would be expected to interpret the WTO agreements in the same manner that they were interpreted in the original proceeding. Indeed, without the 'law of the case' doctrine, a defendant could do exactly what it was told to do and find that it is nevertheless in violation because of a different legal interpretation of the WTO agreements. Such a 'moving target' could be considered unfair to the defendant and could upset the security and predictability of the trading system.

C. How Long Does a Member Have to Invoke Article 21.5: the Doctrine of Laches

The special characteristic of an Article 21.5 proceeding is its expedited nature. The 90-day rule (from the time the matter is referred to the panel to the time the panel circulates its findings) demonstrates that time is of the essence. This short timeframe helps to effectuate the DSU goal of 'prompt' compliance or settlement.[67]

[64] *US – Shrimp (21.5)*, above n 24, para 5.26.

[65] Appellate Body Report, *United States – Shrimp (21.5)*, above n 60, para 108 (quoting Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996: I, 97, at 108).

[66] *Black's Law Dictionary*, 6th ed (1990). The law of the case doctrine is different from, and narrower than, the doctrine of *stare decisis*. There is reason to doubt that the DSU recognizes the formal doctrine of *stare decisis* (see, e.g., John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, (2nd edn, Cambridge, MA: The MIT Press 2000) 126, even if panel and Appellate Body reports create 'legitimate expectations'.

[67] See DSU Articles 3.3, 21.1.

Because Article 21.5 is meant to provide a rapid review, the question arises as to whether a Member should be permitted to initiate an Article 21.5 proceeding if it has failed to do so for an extended period of time without justification. To be sure, the DSU encourages the parties to engage in consultations toward reaching a settlement, and such negotiations are a justification for delaying the Article 21.5 review. Yet if no consultations are ongoing, it may be an abuse for the original complainant to sleep on its rights for an extended period before calling for an Article 21.5 compliance review. Long time lags may also erode the 'security and predictability' of the DSU. While it is true that the language in Article 21.5 contains no time limitation, one wonders whether the Members who wrote Article 21.5 intended that door to remain open indefinitely. It may be that the DSU needs a doctrine of laches which in common law provides that a court should not hear a case in which the complainant neglects to assert its rights within a reasonable period of time, if that neglect prejudices the other party. An expiry of access to Article 21.5 would mean that the complainant would be required to return to the regular DSU Article 6 procedures.

At this point, only one complainant, Malaysia in *United States – Shrimp (21.5)*, has requested the establishment of an Article 21.5 panel long after the expiration of the reasonable period for compliance. Malaysia did so more than ten months after that point.[68] It appears that Malaysia was reasonably diligent in protecting its rights over these months. The parties were engaged in multilateral negotiations for the protection of sea turtles, and an agreement would have resolved the underlying dispute. So the delay was justifiable.

D. May Previous Determinations Be Relitigated: The Role of Collateral Estoppel

The quest for closure and prompt compliance leads to another issue: Should panels and the Appellate Body formally recognize the doctrine of collateral estoppel? This doctrine provides that when an issue of fact has been determined by one valid judgment, that issue cannot be litigated again between the same parties. Although every Article 21.5 proceeding will occur in the context of previous litigation between the same parties, in the typical Article 21.5 proceeding, the collateral estoppel doctrine may not have relevance because the measures taken to comply will raise new factual issues that were not addressed in the original proceeding. In some instances, however, a party may seek to reopen factual issues raised and ruled upon in the original dispute.[69]

For example, in the Article 21.5 dispute 'Mexico – Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States',

[68] *US – Shrimp (21.5)*, above n 24, paras 1.1–1.4.

[69] One would expect this issue to arise in Article 21.5 proceedings involving the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, the SCM Agreement, or the Agreement on Safeguards because a Member's redetermination in these investigations is typically based on the same set of facts.

Mexico attempted to relitigate a factual issue regarding an alleged agreement between Mexican sugar millers and soft-drink bottlers to restrain the bottlers' use of HFCS.[70] Mexico claimed that the original panel and the Article 21.5 panel 'made exactly the same mistake' in finding that the Mexican authorities should have examined the impact of that agreement on domestic HFCS producers even though the existence of such agreement had not been proven.[71] In refusing to reopen this question of fact, the Appellate Body explained that 'We see no basis for us to examine the original panel's treatment of the alleged restraint agreement'.[72] The Appellate Body also noted the importance to the multilateral trading system of security, predictability, and the prompt settlement of disputes. Thus, in this and possibly other instances, the Appellate Body may be implicitly recognizing a doctrine of collateral estoppel.[73]

CONCLUSION

'The full implications of the Uruguay Round (UR) Agreement and its new institutions are undoubtedly not fully understood yet by any government which has accepted them.'[74] The WTO may have become a little clearer now than it was when John Jackson made this incisive point in 1998, yet new implications continue to develop regularly. Nowhere in the DSU is this more apparent than in Article 21.5. Like the establishment of a standing Appellate Body and the 'negative consensus' rule, the creation of the Article 21 surveillance mechanism has transformed trade law dispute settlement into a much stronger legal system than existed under the GATT. In just a few years, Article 21.5 has become a pillar in the WTO enforcement process and become vital for complainants and defendants alike. Moreover, governments are implementing it flexibly and innovatively to deal with unanticipated problems. Looking beyond the WTO, other regimes of global governance will benefit from studying the emerging Article 21.5 practice.

[70] *Mexico – HFCS (21.5)*, above n 7, para 15.

[71] Ibid.

[72] Ibid, para 79.

[73] See WTO Panel Report, Canada – Export Credits and Loan Guarantees for Regional Aircraft (*Canada – Aircraft II*), WT/DS222/R, adopted 19 February 2002, paras 7.92 ('We recall that the panel in *Canada – Aircraft* rejected Brazil's claim that Canada Account debt financing for the export of Canadian regional aircraft as such constituted an export subsidy[.]') and 7.152 ('[W]e note that the *Canada – Aircraft* panel found that the Canada Account debt financing at issue in that case was ''contingent . . . upon export performance''. For these reasons, we find that support provided under the Canada Account programme . . . is ''contingent in law . . . upon export performance'''.). The panel in India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complaint by the European Communities), WT/DS79/R, adopted 2 September 1998, para 7.42, also suggested that its findings were based on a previous and similar challenge to India's patent system, brought by the United States (dispute WT/DS50). While it is important to note that the parties to these two disputes were not the same, India was perhaps, to some extent, collaterally estopped from relitigating issues that it had previously lost in its dispute with the United States.

[74] John H. Jackson, 'Global Economics and International Economic Law', 1(1) JIEL 1 (1998), at 17.